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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42142

CONSUMERS ENERGY COMPANY
v.
CSX TRANSPORTATION, INC.

Digest:[1] In this decision, the Board grants in part and denies in part CSX Transportation, Inc.'s motion to strike portions of Consumers Energy Company's rebuttal evidence. The Board also orders the parties to submit supplemental evidence on merchandise traffic selection and equity flotation costs, and sets a procedural schedule for the submission of such evidence.

Decided: December 7, 2016

On January 13, 2015, Consumers Energy Company (Consumers) filed a complaint challenging the reasonableness of rates established by CSX Transportation, Inc. (CSXT). CSXT provides Consumers with unit train coal transportation service in shipper-supplied rail cars to Consumers' generating station near West Olive, Mich., from CSXT's established railroad interchange with BNSF Railway Company in the vicinity of Chicago, Ill. Consumers alleges that CSXT's rates are unreasonable under both the stand-alone cost (SAC) constraint and the revenue adequacy constraint. A procedural schedule was set, and the parties' evidentiary submissions were completed on June 24, 2016, with the filing of final briefs.

Concurrently with the filing of its final brief, CSXT filed a motion to strike portions of Consumers' rebuttal evidence. Consumers filed a letter in opposition to CSXT's motion on June 27, 2016, and a reply to CSXT's motion on July 14, 2016. Also on July 14, 2016, Consumers petitioned for leave to file supplemental evidence on equity flotation costs. CSXT replied in opposition on July 26, 2016. The Board has considered CSXT's motion and Consumers' petition.

This decision addresses CSXT's motion to strike and Consumers' petition for leave to file supplemental evidence on equity flotation costs. In addition, the Board has identified an issue concerning Consumers' selection of merchandise traffic in its SAC case as part of its traffic group selection for the stand-alone railroad (SARR), the Consumers Energy Railroad (CERR), that needs to be addressed before the case proceeds. As explained below, the parties will be

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

directed to submit a round of evidence addressing both the merchandise traffic issue and equity flotation costs, and a procedural schedule will be established to complete the submission of evidence in this proceeding.

MOTION TO STRIKE

Acceptance of the Motion to Strike

In its June 27, 2016 letter in opposition to CSXT's motion to strike, Consumers states that it assumes that the Board will reject CSXT's motion to strike because it was filed more than 20 days after Consumers filed its rebuttal evidence and is thus untimely under 49 C.F.R. § 1104.13. CSXT responded on June 29, 2016, citing Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Co. (Sunbelt 2013), NOR 42130 (STB served July 15, 2013), for the proposition that the Board has "explicitly sanctioned the filing of motions to strike well over 20 days after rebuttal." CSXT argues that, even if the Board determines that the motion to strike was late-filed, there is good cause for accepting the motion, in that CSXT relied on the Board's practice in recent cases of ruling on motions to strike that were filed after 20 days. CSXT cites to Sunbelt 2013, Total Petrochemicals & Refining USA, Inc. v. CSX Transportation, Inc. (Total Petrochemicals 2013), NOR 42121 (STB served May 31, 2013), and M&G Polymers USA, LLC v. CSX Transportation, Inc., NOR 42123 (STB served Sept. 27, 2012), corrected and updated (STB served Dec. 7, 2012). CSXT also states that Consumers does not claim to have suffered any prejudice from CSXT filing its motion more than 20 days after rebuttal. Consumers filed a reply to CSXT's motion to strike on July 14, 2016, reiterating its position that the motion was untimely, but also arguing that the Board should deny CSXT's motion on its merits.

Under 49 C.F.R. § 1104.13(a), parties may file a reply or a motion addressed to any pleading within 20 days after that pleading was filed, unless the Board specifies a different time frame. This rule applies to motions to strike rebuttal evidence. See AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1), slip op. at 1 (STB served Aug. 12, 2004). While the Board considered motions to strike filed more than 20 days after the filing of rebuttal evidence in Sunbelt 2013, Total Petrochemicals 2013, and M&G Polymers, the issue of timeliness under § 1104.13(a) was never raised by the parties in those cases. Contrary to CSXT's argument, Sunbelt 2013 does not "explicitly sanction the filing of motions to strike well over 20 days after rebuttal," but was instead silent as to the timeliness of motions to strike. The quotation used by CSXT was in the context of the Board's general statement that "a closing brief is not the proper vehicle to raise [improper rebuttal] arguments," and that such "arguments should instead be addressed in a motion to strike." Sunbelt 2013, NOR 42130, slip op. at 2.

Nevertheless, the Board will accept CSXT's motion to strike for good cause. Consumers has not claimed that the delay in filing the motion has caused any prejudice and the Board has previously accepted motions to strike after the 20-day time limit, a fact that CSXT may have relied on in good faith. However, the Board emphasizes that future motions to strike should be filed within the 20-day time period, consistent with the Board's regulations.

Motion to Strike Standard

As the Board has noted, rebuttal may not be used in SAC cases as an opportunity to introduce new evidence that could and should have been submitted on opening. Gen. Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, 5 S.T.B. 441, 446 (2001). The Board has previously declared:

> On rebuttal, as to those issues challenged by the railroad, the shipper may demonstrate that its opening evidence was feasible and supported, it may adopt the railroad's evidence, or in certain circumstances it may offer to refine its evidence to address issues raised by the railroad regarding its opening evidence. Where the railroad has identified flaws in the shipper's evidence but has not provided evidence that can be used in the Board's SAC analysis, or where the shipper shows that the railroad's reply evidence is itself unsupported, infeasible or unrealistic, the shipper may supply corrective evidence.

Duke Energy Corp. v. Norfolk S. Ry., 7 S.T.B. 89, 101 (2003).

Applying the Duke Energy standard, the Board will grant in part and deny in part CSXT's motion to strike, as explained further below. The Board advises that its findings with respect to CSXT's motion to strike address the admissibility of rebuttal evidence and arguments only, and not the merits of the underlying issues.

Market Dominance

A significant dispute between the parties is over the issue of market dominance. Consumers has argued that it explored other potential transportation alternatives, but they are significantly costlier than direct rail service from CSXT, and thus do not function as an effective constraint on CSXT's pricing. CSXT disputes these claims, arguing that there are indeed competitive transportation options. In particular, it claims that Consumers has two different options to receive coal by water vessel at its Campbell generating station, which is located on Pigeon Lake. First, CSXT argues that Consumers could ship coal by water vessel directly to the Campbell facility by constructing a dock at the facility. Second, CSXT argues that Consumers could ship coal by water vessel to Consumers' Cobb facility, which is located 25 miles north of Campbell and already has an existing dock, where the coal could then be transferred to a short line railroad called Michigan Shore Railroad (MSRR), and then transported by rail to Campbell.

1. Operating Costs of Transportation Alternatives.

In its motion to strike, CSXT argues that, on rebuttal, Consumers improperly modified its opening operating costs of the alleged transportation alternatives with respect to the per ton rate, the per ton estimate, dredging costs, and rail demurrage costs.

Per ton rate. On opening, Consumers' witness Dr. Barbaro calculated a per ton rate for vessel transportation to the Campbell plant. (Consumers Opening Ex. II-1 at 47.) In its motion to strike, CSXT alleges that it relied on Consumers' opening per ton rate on reply, but that on

rebuttal, Consumers' witness Dr. Barbaro stated that the per ton rate was too low and made adjustments to account for certain differences between contemplated contract operations and CSXT's proposed alternative (such as an allegedly longer loading and unloading process). (CSXT Mot. 8.)

In response, Consumers argues that CSXT did not adopt Consumers' opening per ton rate, but rather, cherry-picked one component of it, and then applied it to a different and incompatible scenario. (Consumers Reply 4.) For example, Consumers asserts that CSXT's scenario involved the use of smaller vessels; extended seasonal operations; and an included assumption that each vessel would carry only a single trainload of coal, which would result in vessel loading delays. (Consumers Reply 4-5.) Consumers argues that, because of these distinctions between Consumers' opening scenario and that proposed by CSXT on reply, the component of the per ton rate adopted by CSXT on reply was invalid. (Consumers Reply 4; see also Consumers Rebuttal Ex. II-1 at 65-68.) As such, Consumers argues that it was entitled to demonstrate the additional costs stemming from these distinctions on rebuttal. (Consumers Reply 5.)

The Board will deny CSXT's motion to strike Consumers' modification of its opening per ton rate. CSXT indeed challenged Consumers' opening evaluation of transportation alternatives, and as such, Consumers was entitled to offer corrective evidence to demonstrate that CSXT's reply evidence was unsupported, infeasible, or unrealistic. Duke Energy, 7 S.T.B. at 101. Consumers' rebuttal per ton rate directly responded to CSXT's modifications to Consumers' opening evidence, and is thus proper rebuttal evidence.

Per ton estimate. On opening, Consumers' witness Dr. Barbaro proposed a per ton estimate for operations at the Campbell generating station if coal were to be received by barge. (Consumers Opening Ex. II-1 at 86.) CSXT alleges in its motion to strike that it adopted Dr. Barbaro's per ton estimate on reply, but on rebuttal, Dr. Barbaro claimed that the per ton estimate was too low. (CSXT Mot. 8-9.) CSXT further contends that the reason Dr. Barbaro gave on rebuttal for this adjustment—that Consumers and CSXT offered differing volume estimates of the amount of coal to be delivered to Campbell—was not argued on opening. (Id.)

In response, Consumers argues that a volume-based adjustment was properly responsive to the CSXT reply plan. Consumers argues that CSXT's plan accounted for delivery of significantly less coal per year than did Consumers on opening, which translated into a higher per ton cost. (Consumers Reply 5; Consumers Rebuttal Ex. II-1 at 68.)

The Board will deny CSXT's motion to strike Consumers' modification of its opening per ton estimate. Although CSXT accepted Consumers' opening per ton estimate, it also made a significant adjustment in the estimated amount of coal that would have to be delivered to Campbell per year, which entitled Consumers to offer corrective rebuttal evidence to show that CSXT's reply evidence was unsupported, infeasible, or unrealistic. Duke Energy, 7 S.T.B. at 101. Consumers' rebuttal volume-based adjustment responded directly to CSXT's changes on reply, and is thus proper rebuttal evidence.

Dredging costs. On opening, Consumers estimates the platform operating costs at Pigeon Lake based on an estimate produced by WorleyParsons Resources & Energy (WorleyParsons). (Consumers Opening II-52.) On reply, CSXT submits evidence of the cost of constructing facilities at Campbell that allow for coal to be received by barge, which were developed by its expert, TransSystems. On rebuttal, Consumers' witness, Dr. Barbaro, claims that CSXT's expert, TranSystems, states that Consumers would be responsible for certain maintenance at Pigeon Lake, including dredging. (Consumers Rebuttal Ex. II-B-1 at 12.) Dr. Barbaro included dredging costs on rebuttal in response to TranSystems' proposal, at an estimated $1 million annually. (Consumers Rebuttal Ex. II-1 at 68.)

In its motion to strike, CSXT argues that Consumers should not be permitted to add dredging costs for the first time on rebuttal. (CSXT Mot. 9.)

Consumers argues that its rebuttal additive for dredging was to account for a cost that CSXT said would be incurred but had not actually included in its calculations. (Consumers Reply 5-6; Consumers Rebuttal Ex. II-1 at 68.)

We will deny CSXT's motion to strike Consumers' rebuttal dredging costs. To the extent that CSXT's reply raised dredging costs as an issue, Consumers was entitled to offer corrective evidence to demonstrate that CSXT's reply evidence was unsupported, infeasible, or unrealistic. Duke Energy, 7 S.T.B. at 101.

Rail demurrage costs. CSXT alleges that, on rebuttal, Dr. Barbaro includes rail demurrage costs for the first time when, on opening, Consumers only referenced the potential of demurrage and did not include any costs. (CSXT Mot. 9; see also Consumers Opening Ex. II-1 at 25; Consumers Rebuttal Ex. II-1 at 70-71.)

In response, Consumers argues that its position has always been that vessel shipments through the KCBX Terminal (KCBX) (the marine terminal in Chicago from which the water vessels would launch) were operationally infeasible as a substitute for CSXT rail service, yet Dr. Barbaro nevertheless identified rail demurrage costs as a necessary expense if KCBX was considered as an option. (Consumers Reply 6.) Consumers further maintains that, despite CSXT arguing for demurrage costs, Consumers' inclusion of railroad demurrage costs on rebuttal was a correction of CSXT's failure to include those costs on reply. (Consumers Reply 6.)

The Board will grant CSXT's motion to strike Consumers' rebuttal rail demurrage costs. Consumers' opening arguments acknowledged that rail demurrage costs would be a necessary expense if KCBX was an option, yet Consumers failed to include those costs. Consumers claims that it was not possible to compute the actual demurrage cost on opening without an actual operating plan for the KCBX. (Consumers Reply 6.) However, that argument is unconvincing, as many different aspects of the cost of shipping via KCBX were included in Dr. Barbaro's estimate without an actual KCBX operating plan. By waiting for rebuttal to calculate its rail demurrage costs, Consumers deprived CSXT of the opportunity to respond in full. Duke Energy, 7 S.T.B. at 101; Total Petrochems. 2013, NOR 42121, slip op. at 12.

2. KCBX Capacity.

On opening, Consumers' witness, Dr. Barbaro, argued that KCBX did not have capacity to handle Consumers' coal traffic, based, in part, on a conversation that he had with a third-party. (Consumers Opening Ex. II-1 at 23-24.) The contents of this conversation were noted in a workpaper that Consumers included as part of its opening. CSXT states that, on reply, it relied on a separate statement made by that same third-party (and that was noted in the Consumers opening workpaper) to determine the capacity of KCBX. (CSXT Mot. 9; CSXT Reply II-B-34.) On rebuttal, Consumers, through its witness Dr. Barbaro, argues that the statement from the third-party that CSXT relied on was based on circumstances that have since changed. (Consumers Rebuttal Ex. II-1 at 27.) Dr. Barbaro then provides an analysis showing that KCBX capacity is much less than what CSXT claims. (Id. at 29-37.) In its motion to strike, CSXT argues that a complainant cannot contradict its own opening evidence (which has been accepted by defendant on reply) on rebuttal. (CSXT Mot. 11.)

Consumers replies that it has not contradicted its opening evidence. It acknowledges that the statement relied upon by CSXT was in Consumers' opening workpaper, but Consumers claims that it never actually relied on the statement in its opening. (Consumers Reply 7.) Again, Consumers claims that the reason it submitted the evidence regarding KCBX capacity on rebuttal is that its position on opening was that shipment through KCBX was infeasible. As such, Consumers claims it was permitted to show that CSXT's evidence was unsupported, infeasible or unrealistic on rebuttal. (Consumers Reply 8.)

The Board will grant CSXT's motion to strike Consumers' rebuttal evidence on KCBX capacity. On opening, Dr. Barbaro relied on a conversation with the third-party in his analysis of KCBX capacity on issues directly related to the matter pertinent here. At the time, Dr. Barbaro did not indicate that he was relying on only some of the statements made in that conversation, but not others. Under the circumstances here, it was reasonable for CSXT to rely on the statement by the third-party involving this particular issue, which Dr. Barbaro had not refuted. As such, it is impermissible for Consumers to disavow that position on rebuttal. Pub. Service Co. of Colo. v. Burlington N. & Santa Fe R.R. (Pub. Serv. 2003), NOR 42057, slip op. at 2 (STB served Apr. 4, 2003) (holding that "[t]he interests of fairness and orderly handling of a case dictate that parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other's evidence.").

3. Percentage of Traffic Handled by Competitive Alternative.

CSXT argues that, on opening, Consumers ignored agency precedent and assumed that a competitive alternative to CSXT must transport 100% of the issue traffic. (CSXT Mot. 12.) It was not until rebuttal that Consumers argued that Board precedent holding that alternatives need not handle substantially all or even a majority of the issue traffic should not apply to this case. (CSXT Mot. 12; Consumers Rebuttal II-26.) CSXT argues that Consumers' decision to wait until rebuttal to argue for a departure from precedent in this case deprived CSXT of the chance to respond to that argument. (CSXT Mot. 13.)

Consumers argues that it was rightfully defending its opening position on rebuttal, and that CSXT had a full opportunity in its final brief to respond to every point made by Consumers on rebuttal. (Consumers Reply 9.)

The Board will grant CSXT's motion to strike Consumers' rebuttal argument regarding Board precedent. Given that Consumers' position was a departure from Board precedent, Consumers should have presented its arguments for that departure on opening. Pub. Serv. 2003, NOR 42057, slip op. at 2. Although Consumers argues that CSXT had an opportunity to respond in its final briefs, such filings are not intended to serve as an opportunity for surrebuttal, but are instead supposed to be a summary of key issues. By making its argument on rebuttal, Consumers deprived CSXT of an opportunity to respond.

4. WorleyParsons Report.

On opening, Consumers discusses a 2014 study of transportation alternatives performed by WorleyParsons. (Consumers Opening II-21 to II-32.) On reply, CSXT points out several areas where it believes that WorleyParsons' assumptions are in tension with those of Dr. Barbaro. (CSXT Reply II-B-5, 28, 29.) On rebuttal, Consumers submitted a verified statement from witnesses Mr. Petro and Mr. Bovitz, whom Consumers identifies as the authors of the WorleyParsons report, claiming that the WorleyParsons report was limited in scope and purpose. (Consumers Rebuttal II-15.)

In its motion to strike, CSXT argues that the statements by Mr. Petro and Mr. Bovitz should be stricken. CSXT argues that Consumers knew the significance of the WorleyParsons report on opening, and that waiting until rebuttal to introduce testimony directly related to the study is improper rebuttal. CSXT cites to Total Petrochemicals 2013, NOR 42121, slip op. at 12-13, in which the Board struck the testimony of a rebuttal expert because complainant was "aware" of the "issues on opening," as support.

Consumers argues in response that CSXT's reply presentation included two elements that Consumers had no reason to anticipate on opening: (1) repeated mischaracterizations and misrepresentations of the conclusions reached—and not reached—by the WorleyParsons authors; and (2) a claim that, from the standpoint of commercial vessel transportation, Pigeon Lake is virtually identical to Muskegon Lake. (Consumers Reply 13; Consumers Rebuttal II-15 n.26.) Consumers states that, on rebuttal, it presented a verified statement by Mr. Petro and Mr. Bovitz, the authors of the report, for the purpose of correcting the record on those points. (Consumers Reply 13-14.) Consumers argues that, unlike the evidence that was rejected in Total Petrochemicals 2013, the Petro and Bovitz verified statement did not reflect a new position on the relevance of the WorleyParsons report, or an initial evidentiary submission on an issue that Consumers ignored on opening. (Consumers Reply 14.)

The Board will deny CSXT's motion to strike the Petro and Bovitz verified statement. The statement is permissible rebuttal evidence, as it directly responds to the challenges CSXT raised on reply. See Duke Energy, 7 S.T.B. at 101. This statement is distinguishable from the rebuttal testimony struck in Total Petrochemicals 2013, in which the Board found that the complainant was aware of the issues on opening that it addressed for the first time on rebuttal.

Here, we conclude that Consumers could not have anticipated and addressed on opening the specific critiques and challenges of the WorleyParsons report CSXT would raise on reply, and was therefore entitled to respond on rebuttal.

5. Capital Costs of the Cobb-Rail Option.

On opening, Consumers uses the WorleyParsons study to estimate the capital costs of infrastructure that could connect the Cobb plant to the MSRR. (Consumers Opening Ex. II-1 at 113.) In its motion to strike, CSXT argues that, on rebuttal, Consumers added costs that the WorleyParsons study did not account for, including rail yard upgrades, mobile equipment, additional permitting costs, and a mobilization additive. (CSXT Mot. 16.) CSXT argues that Consumers should have included these costs on opening. (CSXT Mot. 16.)

Consumers essentially responds that it agreed on rebuttal that the existing MSRR yard should be included in consideration of the Cobb alternative, but that there would need to be additional yard track as a result. As such, Consumers claims it was justified in presenting evidence on the additional yard track. (Consumers Reply 15.) Additionally, Consumers argues that Dr. Barbaro's opening figures actually include costs for permitting, environmental mitigation, engineering, procurement (i.e., mobilization), and land, none of which were allegedly accounted for by CSXT on reply. (Consumers Reply 15; Consumers Opening Ex. II-1 at 116-119.)

The Board will deny CSXT's motion to strike the rail yard upgrades, mobile equipment, additional permitting costs, and mobilization additive. Consumers is correct that those categories were in Dr. Barbaro's opening report, (Consumers Opening Ex. II-1 at 116-119), and thus Consumers was not modifying its cost categories on rebuttal. As to the rail yard upgrades, because Consumers did not utilize the MSRR yard on opening, it had no reason to include costs associated with that yard. Consumers was entitled to respond to CSXT's use of that yard on reply, and therefore Consumers' inclusion of rail yard upgrades was proper rebuttal. See Duke Energy, 7 S.T.B. at 101.

Operating Plan

1. Number of Trains Handled by Crew.

On opening, Consumers assumes that crews would handle two movements per day on average. (See Consumers Reply 15.) On reply, CSXT argues that Consumers' plan is impractical because of its assumption that every crew member would be able to complete two train assignments per shift, every day, without once exceeding their hours of service. CSXT also disputes Consumers' assumption that train crews would average 270 shifts per year. (CSXT Reply III-C-69 to III-C-70.) As such, CSXT made adjustments to Consumers' crew staffing requirements to account for the number of shifts it believes a crew member could reasonably be expected to work and for appropriate re-crewing rates. On rebuttal, Consumers argues that CSXT's arguments are flawed and that CSXT fails to account for the fact that some CERR crews could handle up to four trips a day. (Consumers Rebuttal III-D-20.)

In its motion to strike, CSXT argues that four trips a day is unheard of in real-world railroading, and that Consumers did not argue on opening that its crews could handle "such a superhuman workload." (CSXT Mot. 17.) CSXT states that Consumers' rebuttal statement that some CERR crews could handle up to four trips a day deprived CSXT of an opportunity to respond. Consumers contends that its rebuttal statement that some CERR crews could handle up to four trips a day was made to point out that its opening position was well-supported and conservative. (Consumers Reply 16.) Consumers states that it did not actually alter the calculation procedures it used on opening, nor assign any crews to perform more than two turns. (Consumers Reply 16.)

The Board will deny CSXT's motion to strike Consumers' rebuttal statement that one crew could operate up to four trains per day. This statement responded directly to CSXT's critique of Consumers' opening calculation, and did not change Consumers' opening calculation, and is thus proper rebuttal.

2. Excess Run-Through Locomotives.

On opening, Consumers argues that trains operating on the CERR system can operate with two locomotives. To the extent that trains interchanged with a foreign railroad or with the residual CSXT have more than two locomotives, Consumers states that those locomotives would be isolated in the idle position while operating on the CERR. (Consumers Opening III-C-65 to III-C-66.) On reply, CSXT accepts that Consumers could idle these locomotives, but argues that the CERR would still have to compensate other carriers for locomotives (idled or not) while they are on the CERR system. (CSXT Reply III-C-51.) On rebuttal, Consumers rejects those costs, arguing that the CERR's interchange partners have no expectation of compensation for locomotives on run-through trains. (Consumers Rebuttal III-C-104.)

In its motion to strike, CSXT argues that Consumers' argument that the CERR's "interchange partners have no expectation of compensation" should be stricken as improper because it was offered for the first time on rebuttal. (CSXT Mot. 17.) Consumers responds that its rebuttal arguments directly rebutted CSXT's additional costs on reply, while also explaining its approach on opening, which is permissible under governing standards. (Consumers Reply 16-17.)

The Board will deny CSXT's motion to strike Consumers' rebuttal argument on excess run-through locomotives. As discussed above, shippers may submit rebuttal evidence that responds to issues raised on reply. See Duke Energy, 7 S.T.B. at 101. Consumers' rebuttal argument defended its opening argument, and responded to CSXT's claim that the CERR would have to compensate other carriers for locomotives while they were on the CERR system.

Operating Expenses

1. Fringe Benefit Ratio.

On opening, Consumers proposes a fringe benefit ratio of 37.6%, calculated from the 2014 average of all Class I railroads. Consumers states that it relied on the fringe benefits for all

Class I railroads because "each Class I carrier has a presence in the vicinity of the CERR." (Consumers Opening III-D-31.) On reply, CSXT argues that Consumers' approach was flawed because Consumers used a nationwide average and a one-year snapshot. CSXT offers a revised fringe benefit ratio of 41.6% that excludes Kansas City Southern (KCS)—because it is not in the vicinity of Chicago—and also uses a multi-year average. (CSXT Reply III-D-46 to III-D-48.) On rebuttal, Consumers disagrees with the multi-year average used by CSXT and argues that including KCS is appropriate. (Consumers Rebuttal III-D-42 to III-D-43.)

In its motion to strike, with respect to the use of single-year data versus multi-year data, CSXT argues that Consumers submitted a "brand new argument" on rebuttal that 2014 data is superior to an average of 2012 through 2014 data because of increasing efficiency in the railroad industry. (CSXT Mot. 18.) Consumers responds that it properly rebutted CSXT's reply evidence by noting that the 2014 figure is more representative of fringe benefit ratios going forward because the 2014 ratio had declined significantly as compared to 2012 and 2013. (Consumers Reply 18.)

With respect to the exclusion of KCS, CSXT argues in its motion to strike that Consumers has changed arguments from its opening to rebuttal. CSXT claims that on opening, Consumers argued that all railroads (including KCS) should be included in the average because they are in "the vicinity of the CERR," but on rebuttal, instead argues that the inclusion of all Class I railroads is appropriate because the "vast majority of fringe benefits for Class I carriers are for employees that work nowhere near Chicago." (CSXT Mot. 18.) In response, Consumers alleges that CSXT mischaracterizes Consumers' evidence and that its arguments properly responded to CSXT. (Consumers Reply 18.)

The Board will deny CSXT's motion to strike Consumers' rebuttal arguments regarding the fringe benefit ratio. On opening, Consumers justified its inclusion of all Class I's by noting that each had a presence "in the vicinity of the CERR." CSXT's reply argument is that, "[w]hile KCS may have some rights to access Chicago through trackage rights or haulage on other railroads, it has no physical presence in Chicago remotely comparable to other Class I railroads." (CSXT Reply III-D-47.) CSXT thus raises the issue of Chicago in its reply. Consumers does not disavow its opening "in the vicinity" argument by pointing out that most employees of Class I railroads do not work in Chicago; rather it permissibly rebuts CSXT's arguments on reply about Chicago. Similarly, Consumers' rebuttal argument on 2014 data was an appropriate response to CSXT's use of an average on reply. Consumers' argument that 2014 is more representative of the trend of increasing efficiency in the railroad industry than CSXT's use of the 2012 to 2014 average is not a "brand new argument," but rather a critique of CSXT's reply evidence.

2. Information Technology Staffing.

On opening, Consumers identifies Joseph Kruzich as its witness responsible for developing the costs for the CERR's general and administrative staffing and equipment needed for its information technology (IT) function, stating that Mr. Kruzich has considerable experience with the IT function at Class I and other railroads, including for example KCS. (Consumers Opening III-D-67.) On reply, CSXT modified Consumers' staffing by adding

several positions. (CSXT Reply III-D-96 to III-D-98.) On rebuttal, Consumers argues that the additional positions are unwarranted. In making its argument, Consumers, among other things, compares the CERR's IT staffing to KCS's IT staffing, which it had not done on opening. (Consumers Rebuttal III-D-98.)

In its motion to strike, CSXT alleges that Consumers proposed an IT function on opening without providing evidentiary support or benchmarking. (CSXT Mot. 18.) CSXT further alleges that, for the first time on rebuttal, Consumers' expert sought to justify his opening numbers by comparing them to KCS's staffing levels. (CSXT Mot. 19.)

In response, Consumers asserts that it based its opening IT staffing on its expert's many years of experience with KCS, and that, on rebuttal, it directly responded to CSXT's inclusion of additional positions by noting that in some cases Consumers' opening staffing levels were consistent with KCS's staffing levels. (Consumers Reply 19; Consumers Rebuttal III-D-67.) Consumers also points out that it did not modify its opening IT staffing on rebuttal. (Consumers Reply 19.)

The Board will grant CSXT's motion to strike Consumers' rebuttal arguments for IT staffing. Consumers should have explained the rationale behind its proposed IT staffing in its opening narrative. By presenting this rationale for the first time on rebuttal, Consumers deprived CSXT of the opportunity to respond to this argument. Duke Energy, 7 S.T.B. at 101.

3. Attrition Rate.

On opening, Consumers states that its proposed attrition rate is based on CSXT 2012-2014 employee data. (Consumers Opening III-D-89; Consumers Opening WP "Employee_Attrition_Open.xlsx.") On reply, CSXT rejects Consumers' approach, alleging that CSXT's attrition data showed the number of employees who left for a variety reasons (i.e., deceased, furloughed, or retired), but Consumers relied only on the number of employees terminated. (CSXT Reply III-D-106.) On rebuttal, Consumers alleges that it relied only on this number because it would be unreasonable to assume that the newly established CERR would have significant retirement in its first 10 years, or a percentage of deceased employees similar to CSXT. (Consumers Rebuttal III-D-112 to III-D-113.)

In its motion to strike, CSXT asserts that it was not until rebuttal that Consumers first provided an explanation as to why it excluded retired and deceased employees from its evidence. (CSXT Mot. 19.) Consumers responds that its opening approach was self-evident from the submitted workpaper—that the CERR is a new railroad where the proportion of deceased, retired, or furloughed employees is irrelevant. (Consumers Reply 20.) Consumers argues that its rebuttal therefore directly responded to an unexpected criticism. (Consumers Reply 20.)

The Board will grant CSXT's motion to strike Consumers' rebuttal arguments for attrition rate. As Consumers itself pointed out, (Consumers Reply 7 n.28), the Board has affirmed that a party's position is defined by its evidentiary narrative, not by what might be reflected in a workpaper. Sunbelt Chlor Alkali P'ship v. Norfolk S. Ry. (Sunbelt 2016), NOR 42130, slip op. at 18, (STB served Jun. 30, 2016) (citing Ariz. Elec. Power Coop. v. BNSF

Ry., NOR 42113, slip op. at 74 (STB served Nov. 22, 2011), pet. for review denied sub nom. BNSF Ry. v. STB, 748 F.3d 1295 (D.C. Cir. 2014)) (with Board Member Begeman dissenting), appeal docketed sub nom. Sunbelt Chlor Alkali P'ship v. STB, No. 16-15701 (11th Cir. Aug. 26, 2016). Consumers should have explained the rationale behind its proposed attrition rate in its opening narrative. By presenting this rationale for the first time on rebuttal, Consumers deprived CSXT of the opportunity to respond to this argument. Duke Energy, 7 S.T.B. at 101 (shippers must "submit [their] best, least-cost, fully supported case on opening" and "may not hold back to see the railroad's reply evidence before finalizing or supporting its own case.")

4. Maintenance-of-Way Equipment Asset Life.

On opening, Consumers uses a 20-year asset life for maintenance-of-way (MOW) equipment. Although Consumers does not address MOW equipment asset life in its opening narrative, it does include a reference to a 20-year asset life in an opening workpaper. (Consumers Opening WP "CERR Opening MOW Costs.xlsx," Tab "Annual MOW Equipment Cost," Cell Y44.) On reply, CSXT disagrees with Consumers' assumption that track machinery would have a useful life of 20 years, and offers evidence that the depreciable life of construction machinery is 10 years. (CSXT Reply III-D-133 to III-D-134.) On rebuttal, Consumers alleges that the same document on which CSXT relies also determines the useful life of railroad equipment, which would include some MOW equipment, at 28 years. (Consumers Rebuttal III-D-139.)

In its motion to strike, CSXT argues that Consumers sought, for the first time on rebuttal, to support its 20-year figure with untimely new evidence. (CSXT Mot. 20; Consumers Rebuttal III-D-138 to III-D-139.) Consumers argues that it rebutted CSXT's reply argument using the very same public document upon which CSXT relied, as well as documents produced by CSXT in discovery.[2] (Consumers Reply 20; Consumers Rebuttal III-D-139.) Consumers argues that its rebuttal was permissible and proper in that it did not alter its opening position and that it responded to CSXT's revision with public documents and documents in CSXT's possession. (Consumers Reply 20-21.)

The Board will deny CSXT's motion to strike Consumers' rebuttal rationale for MOW equipment asset life. On rebuttal, Consumers was permitted to demonstrate that CSXT's reply evidence is unsupported, infeasible, or unrealistic by relying on CSXT's own documents. See Duke Energy, 7 S.T.B. at 101. However, while Consumers may utilize CSXT's reply evidence to critique that evidence, Consumers may not utilize that evidence to support its opening position. This is consistent with the requirement that Consumers must "submit [its] best, least-cost, fully supported case on opening." Id.

[2] Consumers also argues that public documents are not new evidence. (Consumers Reply 20.) We address that argument below.

Road Property Investment

1. Real Estate Acquisition Costs.

On opening, Consumers states that the total cost of the property necessary for construction of the CERR is $120.2 million, and that property values were determined by evaluating land sales adjacent to or near the CSXT lines being replicated. (Consumers Opening III-F-6.) Consumers also raises problems with CSXT's discovery responses, alleging that CSXT's failure to properly link spreadsheets prevented Consumers from identifying easements applicable to the CERR. (Consumers Opening III-F-9.) On reply, CSXT argues that the cost of the land the CERR would need is $131.7 million. CSXT also argues that, separate and apart from the cost of the land at its appraised value, the CERR would incur additional transaction costs for acquiring that land, which Consumers failed to include. CSXT estimates an acquisition cost of $20.8 million. (CSXT Reply III-F-4, III-F-18 to III-F-21.) On rebuttal, Consumers argues that CSXT's real estate acquisition costs of $20.8 million are unsupported by evidence and inconsistent with Board precedent. (Consumers Rebuttal III-F-19.) Consumers reiterates its concerns with CSXT's discovery, and argues that CSXT's proposed $20.8 million acquisition cost is not on the same scale of acquisition costs previously allowed by the Board. (Consumers Rebuttal III-F-20 to III-F-21.)

In its motion to strike, CSXT argues that Consumers claimed for the first time on rebuttal that acquisition costs should not be included because of supposed discovery problems. Thus, CSXT argues that the Board should strike that claim. (CSXT Mot. 20-21.)

In response, Consumers argues that it defended its opening position on rebuttal on several grounds beyond problems with CSXT's discovery production. (Consumers Reply 21.) Moreover, Consumers asserts that it specifically raised the problems with CSXT's discovery production on opening. (Consumers Reply 21.)[3]

The Board will deny CSXT's motion to strike Consumers' rebuttal arguments for real estate acquisition costs. Consumers did raise the alleged problems with CSXT's discovery production on opening, and thus is not precluded from discussing those problems on rebuttal. (Consumers Opening III-F-9.) Further, the remainder of Consumers' discussion of real estate acquisition costs on rebuttal responds directly to the arguments CSXT made on reply, and is proper rebuttal. See Duke Energy, 7 S.T.B. at 101.

2. Rail Train Costs.

On opening, Consumers states that to construct the Porter to West Olive segment of the CERR, it included a cost for moving materials to the construction site. Consumers explains that this cost includes both the cost for transporting the materials 1,000 rail miles and the cost to rent one rail work car for four days. (Consumers Opening III-F-57, Consumers Opening WP "Rail

[3] Consumers also states that acquisition expenses were included in its opening costs, citing a report where market value includes the passage of title from buyer to seller. (Consumers Reply 21.)

Worksheet – 2015.xls".) Consumers asserts that, following delivery of the rail for the main line, the rail would be unloaded and distributed by the rail installation contractor, which costs are covered in Consumers' track construction labor costs. (Consumers Opening III-F-57.) On reply, CSXT alleges that Consumers does not fully account for the equipment rental cost it would incur while rail is being unloaded. (CSXT Reply III-F-80 to III-F-81.) In particular, CSXT asserts that Consumers would only have a three-day grace period to unload the rail, but after three days, Consumers would have to pay an additional rental fee. CSXT experts estimate that each rail train will be on the CERR for a total of 17 days, and adjusts this cost accordingly. (CSXT Reply III-F-81.) On rebuttal, Consumers rejects CSXT's proposal that unloading would take 17 days, and explains its plan for unloading the rail within the three-day grace period. (Consumers Rebuttal III-F-88 to III-F-89.)

In its motion to strike, CSXT argues that Consumers waited until rebuttal to propose a novel approach in which rail trains would be unloaded by having contractors "drag rail for miles at top speed down the unfinished roadbed." (CSXT Mot. 21.) By waiting until rebuttal to explain its plan, CSXT argues that Consumers deprived CSXT of its opportunity to explain how this plan would not be feasible. (CSXT Mot. 21.)

Consumers responds that there was no reason for its opening evidence to include a plan for off-loading because that work would be done by a contractor, whose costs are covered in track construction labor costs. (Consumers Reply 22.) Consumers argues that its experts refuted CSXT's assumption that it would take 17 days to off-load and showed that the standard equipment for rail construction incorporated in Consumers' opening evidence was physically capable of off-loading the rail trains within approximately 1.5 days, using the contract labor that the CERR would employ. (Consumers Reply 22.) Consumers argues that it did not deviate from its opening position and was entitled to respond to new arguments raised by CSXT. (Consumers Reply 22.)

The Board will deny CSXT's motion to strike Consumers' rebuttal explanation for rail train costs. Consumers' opening provided an explanation for rail train costs, and on rebuttal, it responded to arguments that CSXT made on reply. See Total Petrochems. 2013, NOR 42121, slip op. at 14. Consumers was entitled to offer corrective evidence to demonstrate that CSXT's reply evidence was unsupported, infeasible or unrealistic. Duke Energy, 7 S.T.B. at 101.

3. Diamond Crossings.

On opening, Consumers explains that it identified only one rail crossing along the CERR's route where the CERR would be responsible for the costs of the crossing. (Consumers Opening III-F-59.) On reply, CSXT identifies a total of 20 crossing diamonds for which the CERR would be wholly or partially responsible for costs. (CSXT Reply III-F-85 to III-F-87.) On rebuttal, Consumers acknowledges the CERR's responsibility for some of the diamond crossings identified by CSXT, but argues that others should not be included because either CSXT did not itself bear the costs (as it was the senior railroad at the time of the crossing's construction) or the crossing would not occur on the CERR. (Consumers Rebuttal III-F-95 to III-F-97.)

In its motion to strike, CSXT argues that none of the new justifications proffered by Consumers on rebuttal were presented on opening, and that including them on rebuttal is improper. (CSXT Mot. 22.) Consumers responds that it reviewed CSXT's evidence and determined that some of the proposed additional crossings were appropriate, and that in each instance where Consumers rejected CSXT's new diamond crossing costs, Consumers relied on CSXT's own documents that were provided in discovery, track charts, or publicly available maps. (Consumers Reply 23.)

The Board will deny CSXT's motion to strike Consumers' rebuttal justifications for diamond crossings. For those diamond crossings proposed by CSXT on reply and rejected by Consumers on rebuttal, Consumers either alleges that CSXT did not itself bear such costs (as it was the senior railroad at the time of the crossings' construction), an argument that it did make on opening. In other instances, Consumers argued that the diamond crossing would not occur on the CERR, which is properly responsive to CSXT's claim that Consumers would have to incur such costs. (Consumers Rebuttal III-F-95 to III-F-97.) The Board thus finds this to be proper rebuttal evidence. See Duke Energy, 7 S.T.B. at 101.

4. Calumet Sag and Chicago Sanitary Channel Bridges.

On opening, Consumers argues that it need not include the costs to build two bridges—the Calumet Sag Channel Bridge and the Chicago Sanitary Channel Bridge—because they were constructed by the City of Chicago, not CSXT or its predecessors. (Consumers Opening III-F-63.) In support of its argument, Consumers submitted a news article. On reply, CSXT argues that the CERR must pay for the construction of both bridges, as the news article did not mention the Calumet Sag Channel Bridge, and indicated that the publicly funded movable bridge over the Chicago Sanitary Channel replaced a prior nonmovable bridge. (CSXT Reply III-F-88 to III-F-89). On rebuttal, Consumers states that it performed additional research to find another article that it alleges demonstrates that the CERR would not need to pay for the bridges. (Consumers Rebuttal III-F-100.)

In its motion to strike, CSXT argues that Consumers may not use rebuttal to provide further evidentiary support for its opening position that could and should have been introduced as evidence then. (CSXT Mot. 23.) Consumers responds that it presented additional, publicly available records on rebuttal and that it is "'well-settled' that such publicly-sourced information is not considered 'new evidence.'" (Consumers Reply 25 (citing N. Am. Freight Car Ass'n v. Union Pac. R.R., NOR 42119, slip op. at 4-5 (STB served Mar. 12, 2015)).)

The Board will deny CSXT's motion to strike Consumers' rebuttal evidence regarding the Calumet Sag and Chicago Sanitary Channel Bridges. Consumers is correct that, in certain circumstances, the Board has not considered publicly available information to be new evidence.[4] The Board has reconsidered this policy, however, and finds that it would undermine the Board's

[4] See N. Am. Freight Car Ass'n, NOR 42119, slip op. at 4-5 (finding that a publicly available document offered for the first time on final brief was not new evidence); Total Petrochems. 2013, NOR 42121, slip op. at 14-15 (finding that publicly available new evidence is permissible rebuttal evidence).

standard that shippers must "submit [their] best, least-cost, fully supported case on opening." Duke Energy, 7 S.T.B. at 101; see also Gen. Procedures, 5 S.T.B. at 445-46; Pub. Serv. 2003, NOR 42057, slip op. at 2. Permitting new evidence on rebuttal, whether publicly available information or not, deprives the railroad of the opportunity to respond to that evidence. Going forward, in the event that a complainant seeks to file new evidence after filing its opening evidence, the complainant may file a petition to supplement the evidentiary record, as Consumers has done with respect to equity flotation costs, at which point, the Board will determine whether such supplemental evidence should be allowed into the record. See Duke Energy, 7 S.T.B. at 101.

However, at the time Consumers filed its rebuttal evidence, its publicly available evidence was consistent with prior Board precedent. As concerns about fairness led us to accept CSXT's motion to strike, see supra p. 4, it would also be unfair to strike Consumers' rebuttal evidence. Because CSXT has not yet had the opportunity to respond to Consumers' rebuttal evidence on this issue, CSXT may do so in its submission of supplemental evidence in response to this decision.

5. Bridge Design.

On opening, Consumers proposes three standard bridge types and states that its bridge designs and costs were derived from CSXT projects, however, the designs were modified to use pre-cast components (such as pre-cast pier caps). (Consumers Opening III-F-66 to III-F-67.) On reply, CSXT alleges that Consumers' bridge design would require spill slopes and additional piers, which would impede waterways and encroach on existing roadways and sidewalks. As such, CSXT makes adjustments to Consumers' bridge designs. (CSXT Reply III-F-92 to III-F-98.) On rebuttal, Consumers argues that CSXT's engineers wrongly assume that the CERR's proposed bridges must have a spill slope. (Consumers Rebuttal III-F-101.) Consumers also alleges that its pre-cast wing wall cost was intended as an "average cost"— not necessarily the specific cost for every location. (Consumers Rebuttal III-F-101 to III-F-102.)

In its motion to strike, CSXT alleges that Consumers' rebuttal claim that its opening bridge design costs were only "average costs" and that funds can be reallocated is an improper alteration of Consumers' opening position. (CSXT Mot. 24.)

Consumers argues that, on rebuttal, it explained that its opening "average cost" approach conservatively allocated monies for components that would not be required, leaving excess CERR funds to be dedicated elsewhere. (Consumers Reply 26.) Consumers argues that it defended its opening position on rebuttal without introducing new evidence, fitting "squarely within the scope of rebuttal." (Id.)

The Board will deny CSXT's motion to strike Consumers' rebuttal evidence on bridge design. As discussed above, because CSXT challenged Consumers' opening bridge designs, Consumers was entitled to attempt to demonstrate that its opening evidence is feasible and supported through its explanation of its opening "average cost" approach. Moreover, Consumers was entitled to offer corrective evidence to demonstrate that CSXT's reply evidence was

unsupported, infeasible, or unrealistic. Duke Energy, 7 S.T.B. at 101. Accordingly, the Board finds this to be proper rebuttal evidence.

Discounted Cash Flow: Equity Flotation Costs and Private Placement

CSXT's motion to strike Consumers' rebuttal challenge to the determination in Sunbelt Chlor Alkali Partnership v. Norfolk Southern Railway Co. (Sunbelt 2014), NOR 42130 (STB served Jun. 20, 2014), regarding equity flotation costs and evidence of private placement costs are denied as moot, as discussed below.

MERCHANDISE TRAFFIC

The Parties' Arguments Regarding Merchandise Traffic

On opening, Consumers proposes a traffic group composed of Consumers' Campbell coal traffic, carload traffic (including coal and general freight or merchandise traffic), and container traffic. (Consumers Opening III-A-5 to III-A-8, Ex. III-A-2.) In its selection of merchandise traffic, Consumers excludes any trains that contain Toxic-by-Inhalation Hazardous (TIH) traffic, as well as any trains that would require intermediate switching.

CSXT objects to Consumers' selection of merchandise traffic, arguing that Consumers did not select a group of merchandise shippers for the CERR to serve, or a group of shipments moving between certain origins and destinations, but instead improperly selected a group of merchandise trains and used the revenue and traffic characteristics of the cars on those trains as surrogates for prospective CERR revenues and tons. (CSXT Reply III-A-6 to III-A-10.) In other words, CSXT argues that the CERR would serve a merchandise customer if its traffic arrived in a particular way (i.e., on trains that require no switching in Chicago and carrying no TIH traffic), but that same customer would be denied service if its traffic arrived on a train that switched in Chicago or had TIH traffic. (CSXT Reply III-A-8.) It argues that the manner in which Consumers "carves up" traffic from merchandise customers is unreasonable and should be rejected by the Board as inconsistent with agency precedent. (CSXT Reply III-A-34.) CSXT contends that this type of traffic grouping is inconsistent with Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987), which contemplated "a group of shippers." (CSXT Reply III-A-7.) CSXT further argues that Consumers' selection of merchandise traffic is inconsistent with the common carrier obligation and a violation of the principles of real world railroading. (CSXT Reply III-A-34; CSXT Final Brief 14.)

For these reasons, CSXT argues that the Board should exclude all of this merchandise traffic from Consumers' traffic group (though it states that it nevertheless included the traffic in its reply because the Board has never had the opportunity to consider this kind of traffic selection in the past). (CSXT Reply III-A-5, III-A-10 to III-A-11.) CSXT claims that the Board should require the parties to submit technical corrections to remove the merchandise traffic and describe any other changes that flow from that decision. (CSXT Reply III-A-11 (citing Otter Tail Power Co. v. BNSF Ry., NOR 42071, slip op. at 2-3 (STB served Dec. 13, 2004).) Should the Board disagree, CSXT proposes modifications to Consumers' Average Total Cost revenue allocation

process to eliminate the bias it claims is introduced by Consumers in selecting only this kind of hook-and-haul carload traffic. (CSXT Reply III-A-34 to III-A-37.)

On rebuttal, Consumers acknowledges that it only included merchandise traffic that does not require intermediate switching and does not contain TIH shipments, but argues that doing so is consistent with the SAC goals of maximizing efficiency and minimizing costs. (Consumers Rebuttal III-A-2 to III-A-3.) Consumers maintains that CSXT mischaracterizes the nature of the grouping principles in Coal Rate Guidelines, and argues instead that the overriding principle is that "broad flexibility" is afforded to a complainant in designing a stand-alone system. (Id. at III-A-4 to III-A-5; Consumers Final Brief 15.) It states that nothing in agency precedent compels a complainant to handle either all or none of a shipper's traffic. (Consumers Rebuttal III-A-5; Consumers Final Brief 15.) Consumers further argues that the Board has approved similar traffic selection decisions in previous cases. (Consumers Rebuttal III-A-4, III-A-7.) Specifically, Consumers argues that the Board has issued a number of decisions in "coal only" SAC cases where the complainants' traffic groups included efficient unit coal train movements, but excluded the smaller limestone shipments made by the same utilities. (Id. at III-A-9 (citing W. Fuels Ass'n v. BNSF Ry. (W. Fuels 2009), NOR 42088, slip op. at 11 (STB served Feb. 18, 2009); Tex. Mun. Power Agency v. Burlington N. & Santa Fe Ry., 6 S.T.B. 573, 588 (2003); Wis. Power & Light Co. v. Union Pac. R.R., 5 S.T.B. 955, 967 (2001); W. Tex. Utils. Co. v. Burlington N. R.R., 1 S.T.B. 638, 657 (1996)).)

Board Decision

In Coal Rate Guidelines, the Board's predecessor, the Interstate Commerce Commission, laid out the principles of the SAC constraint. With respect to traffic group selection, the agency noted that "[t]he ability to group traffic of different shippers is essential to theory of contestability." 1 I.C.C.2d at 544. It went on to say that, notwithstanding debate over what traffic should be included in a stand-alone system, it saw

> no need for any restrictions on the traffic that may potentially be included in a stand-alone group. But the potential traffic draw and attendant costs and revenues that the hypothetical stand-alone provider could expect are open to scrutiny in individual cases. The proponent of a particular stand-alone model must identify, and be prepared to defend, the assumptions and selections it has made.

1 I.C.C.2d at 544.

Over the years, the agency has provided further guidance on traffic group selection. Subsequent to Coal Rate Guidelines, the Board held that, "[w]hile a complainant has considerable flexibility in designing and locating the SARR and grouping traffic to take advantage of the traffic densities, it does not have unbridled discretion." Tex. Mun. Power, 6 S.T.B. at 589. The Board's precedent further requires that the composition of the traffic group, as with all assumptions used in the SAC analysis, be realistic, i.e., consistent with the underlying realities of real-world railroading. See Ariz. Elec., NOR 42113, slip op. at 16; see also W. Fuels 2009, NOR 42088, slip op at 15.

The Board finds that Consumers' treatment of merchandise traffic exceeds a complainant's allowable discretion and is inconsistent with the realities of real-world railroading. As CSXT points out, under Consumers' traffic selection, the CERR would accept a merchandise customer's railcar on one day, but reject it the next if that railcar arrived on a train including TIH traffic or required switching in Chicago. (CSXT Reply III-A-8.) The Board agrees with CSXT that "[n]o real world customer would contract with a railroad on such restrictive terms." (CSXT Reply III-A-8.) Even in the unlikely event that a customer was to agree, it would be extremely difficult, if not impossible, for the CERR to operate in such a manner. In particular, there is no way for the CERR to know on a daily basis what level of equipment and manpower will be necessary to serve the selected merchandise traffic.

Consumers characterizes CSXT as "arguing in essence that a complaining shipper's SARR must transport *all* of the rail traffic of any third-party shipper that it elects to serve." (Consumers Rebuttal III-A-2.) It then points to previous coal cases in which traffic groups included the coal traffic of third-party utility shippers, while excluding those shippers' less profitable and/or less efficient limestone movements over the same lines. (Consumers Rebuttal III-A-9.)

The Board disagrees that Consumers' approach is similar to these prior traffic group selection examples. Consumers misses a key distinction between the cases it cites and the situation here. In those cases, the SARRs excluded a certain commodity—limestone—in its entirety. But the SARR in those cases was not seeking to accept a shipper's limestone one day, but not the next, depending on whether there were characteristics of the move that the SARR found undesirable. That is precisely what the SARR is doing here and there is no case in which the Board has permitted an operation of this kind.

The Board also finds that Consumers' selection of merchandise traffic takes the goals of the SAC test—of maximizing efficiency and minimizing costs—beyond what is possible in real-world railroading. Consumer's traffic selection appears intended specifically to exclude the costs of adding Positive Train Control (PTC) to its system and the costs of on-SARR blocking and classification. While a shipper is certainly permitted to design a maximally efficient, low-cost SARR, if we were to accept Consumers' vision of unfettered traffic selection, SAC complainants could submit traffic groups composed of only the most profitable trains while rejecting less profitable trains of the same sort without any realistic basis for doing so. In that scenario, Consumers and future complainants could obtain from the Board reparations and rate prescriptions based on efficiencies that no defendant could feasibly capture in the real world.

Instead, the Board finds that once a SARR elects to serve a certain subset of traffic—by customer, commodity, route, service type, or some combination thereof—the SARR must serve all of that subset of traffic consistently and without regard to how it is tendered. Because Consumers chose to include merchandise traffic, but does not serve all of that merchandise traffic consistently, its traffic group selection is inappropriate in this case. Because we cannot accept Consumers' traffic group selection, and the railroad failed to provide us with an alternative presentation, we are left with an incomplete record that does not yet contain appropriate evidence on a key issue.

Our precedent establishes that we may request supplemental evidence to complete our regulatory review. See, e.g., Total Petrochems. & Refining USA, Inc. v. CSX Transp., Inc. (Total Petrochems. 2015), NOR 42121 (STB served July 24, 2015); Pub. Serv. Co. of Col. v. Burlington N. & Santa Fe Ry. (Pub. Serv. 2004), 7 S.T.B. 589 (2004). The Board has also allowed parties to supplement or revise their SAC presentations when changes would affect the basic design of a SAC case. See, e.g., W. Fuels 2007, NOR 42088, slip op. at 20. Because the Board has not previously articulated the limit on a complainant's discretion in selecting its traffic group, the Board will allow Consumers to supplement its SAC presentation to remedy its traffic group selection, pursuant to the procedural schedule set out below.

In revising its traffic group, Consumers can either exclude all merchandise traffic, or accept merchandise traffic pursuant to the above standard and include the necessary costs to handle that traffic (e.g., PTC costs). Consumers may also submit evidence on those issues directly affected by its modification of its traffic group, though it may not modify unaffected issues or costs (e.g., while certain quantities may change, unit costs should remain the same). If Consumers submits supplemental evidence on other issues directly related to its change in traffic group, it must explain the need for each change.

PETITION TO SUPPLEMENT

The Parties' Arguments Regarding Equity Flotation Costs

On opening, Consumers explicitly excludes equity flotation costs as part of its cost of capital calculation. (Consumers Opening III-G-5.) In explaining its exclusion of equity flotation costs, Consumers states that, in Sunbelt 2014,[5] the Board indicated that while a SARR may incur costs for floating common equity, such costs can only be included if there was some evidence of the existence and size of equity flotation fees for stock issuances of a similar type and size as that needed by the SARR. (Consumers Opening III-G-5.) Consumers asserts that it followed the approach taken by the Board in Sunbelt 2014 and excluded equity flotation costs from its calculations given the complexity of the issue and the fact that no reasonable surrogates are currently available for the issuance of railroad company stock. (Consumers Opening III-G-5.)

On reply, CSXT objects to Consumers' exclusion of equity flotation costs. It points out that in Sunbelt 2014, the Board said that "it would be unreasonable to assume that the SARR would raise this capital . . . without paying some form of equity flotation fee." (CSXT Reply III-G-2 (citing Sunbelt 2014, NOR 42130, slip op. at 184).) Accordingly, CSXT proposed that the CERR would incur a 6.0% (approximately $41.2 million) equity flotation fee. (CSXT Reply III-G-3 to III-G-4.) CSXT explains that its expert analyzed 535 initial public offerings (IPOs) of $100 million or more that came to market over the past decade to arrive at a figure of 6.0%. (Id.)

On rebuttal, Consumers rejects CSXT's proposed 6.0% equity flotation cost, arguing that it is flawed and not qualitatively superior to claims that the Board has rejected previously. (Consumers Rebuttal III-G-3.) Consumers further argues that CSXT's proposed equity flotation

[5] We refer to Sunbelt 2014 and Sunbelt 2016 here for clarity, though in their pleadings, the parties refer to Sunbelt 2014 simply as Sunbelt, as Sunbelt 2016 had not yet been served.

cost fails to meet the strict standard that the Board has set for the inclusion of a separate flotation cost, a standard which has not been satisfied in any previous case (including Sunbelt 2014). (Consumers Rebuttal III-G-2 to III-G-3.) Specifically, Consumers argues that CSXT's "made-for-litigation" study of IPOs fails the Sunbelt [2014] test because the Board has repeatedly rejected studies produced specifically for litigation and because CSXT's study does not include analyses of any transportation companies or companies "of a similar size…[and] with a similar profile" to the CERR. (Consumers Rebuttal III-G-4 to III-G-5 (citing Sunbelt 2014, NOR 42130, slip op. at 185).) On rebuttal, Consumers also argues that CSXT improperly disregards the fact that the SARR has other options to raise equity capital—namely, private equity placements.[6] (Consumers Rebuttal III-G-6 to III-G-13.)

Following the submission of final briefs, the Board issued Sunbelt 2016, a decision granting in part and denying in part petitions for reconsideration of Sunbelt 2014. Among other findings, the Board concluded that it had materially erred by not accepting the railroad's proposed equity flotation cost evidence. Sunbelt 2016, NOR 42130, slip op. at 29. Shortly thereafter, Consumers filed its petition for leave to file supplemental evidence on equity flotation costs.

In its petition, Consumers explains that it relied on the Board's "virtually unbroken string of precedents culminating in its June 20, 2014 decision in Sunbelt," and thus excluded equity flotation fees from the cost of capital calculation in its opening and rebuttal evidence. (Consumers Pet. 1-2.) Consumers states that the only time the Board approved the inclusion of such a fee was when both the complainant and defendant agreed to the inclusion. (Id. at 2 (citing AEP Tex. N. Co. v. BNSF Ry., NOR 41191 (Sub-No. 1), slip op. at 23 (STB served May 15, 2009)).)

Consumers argues that the Board's Sunbelt 2016 decision reversed its previous rulings on equity flotation costs, on which Consumers had relied. (Consumers Pet. 2.) Consumers alleges that considerations of fairness and administrative due process require that complainants be given an opportunity to submit supplemental evidence when rules or methodologies on which they had relied were changed by the Board after the record has closed. (Consumers Pet. 3 (citing W. Fuels 2009, NOR 42088, slip op. at 9; Otter Tail v. BNSF Ry., NOR 42071, slip op. at 1 (STB served Nov. 21, 2003)).) Consumers argues that, unless it is permitted to supplement the record on the issue of equity flotation costs, Consumers would be penalized unfairly for following what at the time was ruling precedent. (Consumers Pet. 3.)

In its July 26, 2016 response, CSXT maintains that Consumers' petition rests on two false premises: first, that the Board's Sunbelt 2016 decision reversed prior precedent about the need to account for equity flotation costs in the SAC analysis; and second, that a party ought to be allowed to alter its evidence if an intervening decision causes the party to rethink its evidentiary choices. (CSXT Reply 1-2, July 26, 2016.) Citing both E.I. DuPont de Nemours & Co. v. Norfolk Southern Railway, NOR 42125, slip op. at 274 (STB served Mar. 24, 2014), corrected and updated, (STB served Oct. 3, 2014), and Sunbelt 2014, NOR 42130, slip op. at 184, CSXT

[6] Consumers' rebuttal evidence regarding a private equity placement is the subject of CSXT's motion to strike, which we address below.

argues that, by the time Consumers filed its opening evidence on November 2, 2015, the Board had established that equity flotation costs were not included in the railroad industry cost-of-capital estimates and that a flotation cost is a fee that a SARR would incur when raising capital to construct the SARR network. (CSXT Reply 3, July 26, 2016.) According to CSXT, Consumers thus had the opportunity to present evidence on equity flotation costs both on opening, and on rebuttal, after CSXT had offered evidence of an equity flotation fee of 6.0%. (CSXT Reply 3, July 26, 2016.) CSXT also argues that supplemental evidence is appropriate only where an unexpected change to substantive standards makes it unfair to not allow a party to change its presentation. CSXT claims that that is not the situation here, as Consumers had every opportunity to submit the sort of equity flotation costs evidence called for by Sunbelt 2014. (CSXT Reply 5, July 26, 2016.)

Board Decision

The Board has held that, where a complainant seeks to supplement the record in a rail rate case, it must show that "the material sought to be introduced is central to its case, could not reasonably have been introduced earlier, and would materially influence the outcome of the case." Total Petrochems. 2015, NOR 42121, slip op. at 4 (citing Duke Energy Corp. v. CSX Transp., Inc., NOR 42070, slip op. at 4 (STB served Mar. 25, 2003)). The Board finds that, although Consumers does not meet this standard, there is good cause for allowing Consumers to supplement the record in this instance. Specifically, Consumers reasonably relied on Board precedent regarding the standard for inclusion of equity flotation cost evidence and it would be fundamentally unfair to deny it the opportunity to present supplemental evidence based on an unforeseen change to that precedent.

Consumers is correct that, in a number of cases, the Board rejected railroad arguments that equity flotation costs should be included in the cost of capital for a SARR. In fact, prior to AEP Texas in 2007 (in which the parties agreed to the inclusion of equity flotation costs), the Board had solidly rejected the inclusion of a separate equity flotation cost and had established a heavy burden on defendants to justify inclusion of such costs. See, e.g., Ariz. Elec., NOR 42113, slip op. at 137. In part, this was due to the fact that the Board had determined that equity flotation costs were already included in the Board's industry-wide cost-of-capital calculations. See, e.g., Duke Energy Corp. v. CSX Transp., Inc., 7 S.T.B. 402, 433 (2004) (rejecting defendant's fee evidence where plaintiff had argued that cost-of-capital computations already included flotation fees). Another issue was the lack of stock issuances for entities of similar size as a SARR on which to derive an appropriate equity flotation cost. See Ariz. Elec., NOR 42113, slip op. at 138 ("to include [an equity flotation] fee separately, there would have to be evidence of the existence and size of equity-flotation fees for stock issuances of a similar size as that needed by the SARR."); see also Pub. Serv. 2004, 7 S.T.B. at 659.

However, the Board began suggesting in more recent cases that it would be more receptive to the inclusion of equity flotation costs due to the fact the eligible Class I railroads have not issued new shares of equity in recent years, and so equity flotation costs have not been included in the Board's railroad industrywide cost-of-capital determinations since 2005. For example, in both DuPont and Sunbelt 2014, complainants did not include equity flotation costs, while the railroad in both cases argued for an equity flotation cost based on an IPO from

Facebook. The Board in those cases disagreed with the complainants' arguments that equity flotation fees must be excluded from the SAC analysis based on the theory of contestable markets. DuPont, NOR 42125, slip op. at 274; Sunbelt 2014, NOR 42130, slip op. at 184. Instead, the Board found in both cases that whether the capital is raised through one massive IPO, or in smaller amounts over a longer time period, it would be unreasonable to assume that a SARR would raise this capital in either case without paying some sort of equity flotation fee. Id. Ultimately, however, the Board rejected the inclusion of equity flotation costs in both DuPont and Sunbelt 2014 because it found that the defendants had not shown that the Facebook IPO adequately reflected the fees that the SARR would pay to float equity.

In Sunbelt 2016, the Board reversed this decision, holding that it was material error to not accept the railroad's proposed equity flotation cost evidence. Sunbelt 2016, NOR 42130, slip op. at 29. The Board stated that the defendant had presented a justification for including equity flotation costs; specifically, that such costs had not been included in the Board's 2006 through 2011 railroad industry-wide cost-of-capital determinations. It further held that, "in the absence of an alternative proposal by [complainant], the Board should have accepted [defendant]'s proposal, which was supported by reliable evidence." Sunbelt 2016, NOR 42130, slip op. at 29-30.

The Board also explained that it had erred in finding that the Facebook IPO was not a sufficient basis for comparison. The Board noted that although the ideal evidence for equity flotation costs would be a fee in a recent railroad IPO of comparable size, such evidence did not exist. The Board's criticism of the Facebook IPO in the Sunbelt 2014 decision had been that the offering was too different to provide a comparison. Sunbelt 2014, NOR 42130, slip op. at 185. In the Sunbelt 2016 decision, the Board acknowledged that its finding then was consistent with Board precedent, citing Arizona Electric, but then concluded that those requirements "were too stringent, as they would effectively prevent acceptance of any equity flotation fee (despite the Board's conclusion that the SARR would incur such a cost)." Sunbelt 2016, NOR 42130, slip op. at 31.

Sunbelt 2016 marked a departure from prior cases. Not only did the Board accept for the first time an equity flotation fee over the objection of the complainant, it also overturned the Board's prior holding on what would be required of equity flotation evidence. Because Sunbelt 2016 changed Board precedent regarding equity flotation costs in SAC cases, yet Consumers reasonably relied on the Board's pre-Sunbelt 2016 precedent, the Board finds that it would be fundamentally unfair to deny it the opportunity to present supplemental evidence. Accordingly, in the interest of fairness, the Board will allow Consumers to present evidence on equity flotation costs.

Finally, because we are allowing supplemental evidence on equity flotation costs, we will deny CSXT's motion to strike Consumers' rebuttal challenge to the Sunbelt 2014 determination, as well as CSXT's motion to strike Consumers' rebuttal evidence of private placement costs as moot.

PRESENTATION OF EVIDENCE

We will adopt the following procedural schedule for the submission of supplemental evidence:

Consumers files supplemental evidence	January 23, 2017
CSXT files reply evidence	March 6, 2017
Consumers files rebuttal evidence	April 13, 2017

We remind the parties that all evidence must comply with the General Procedures set forth in the Board's July 15, 2015 decision in this proceeding.

It is ordered:

1. CSXT's motion to strike is granted in part and denied in part.

2. CSXT may respond to Consumers' rebuttal evidence on the Calumet Sag and Chicago Sanitary Channel Bridges as described above.

3. The parties are ordered to supplement the record on the CERR's traffic group as described above.

4. Consumers' petition for leave to file supplemental evidence of equity flotation costs is denied, however the parties are ordered to supplement the record on equity flotation costs as described above.

5. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.